

## JAN 13 2009

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY                     

No. 07-1337

## HEARING OFFICER'S REPORT

RESPONDENT.

1. Probable cause was found in this matter on July 14, 2008. A Complaint was thereafter filed on August 6, 2008, and service was accomplished on August 7, 2008. The case was assigned to the undersigned Hearing Officer on August 11, 2008. An Initial Case Management Conference was set and held on August 26, 2008, and the Final Hearing was set on November 10, 2008. Respondent filed an Answer on September 12, 2008. The parties filed a Notice of Settlement on October 24, 2008, and the matter was considered at a hearing on the Agreement on December 1, 2008.

## FINDINGS OF FACT

2. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice in Arizona on May 20, 1995.<sup>1</sup>

<sup>1</sup> Unless otherwise indicated, the facts set forth herein are from the Tender of Admissions stipulated to by the parties.

3. Beginning in September 1999, Respondent represented Barbara Hall-Lockwood (“Ms. Hall-Lockwood”) and Jerry Barber (“Mr. Barber”) concerning an easement dispute on land in Lakeside, Arizona.
4. Respondent's representation ended in or around December 2000.
5. Beginning in or around early 2004, Respondent and Mr. Barber began having discussions about forming a partnership to build and sell a home or homes in Taylor, Arizona.
6. On March 12, 2004, Respondent sent Mr. Barber a letter regarding the formation of the partnership. In the letter, Respondent stated that he (Respondent) must inform Mr. Barber, pursuant to the ethical rules, that Respondent is an attorney.
7. In his letter of March 12, 2004, Respondent did not inform Mr. Barber about the desirability of seeking independent legal counsel, nor did he inform Mr. Barber about the essential terms of the transaction and Respondent's role in the transaction.
8. In April 2004, Respondent and Mr. Barber formed the partnership to build a home or homes in Taylor, Arizona.
9. The partnership agreement was not memorialized in writing at any point in the partnership.
10. The business partnership was an ongoing enterprise.
11. On September 16, 2005, John Doyle (“Mr. Doyle”) filed a civil suit against Ms. Hall-Lockwood and Mr. Barber in the Show Low Justice Court, case number CV 2005-406.

12. On September 29, 2005, Ms. Hall-Lockwood and Mr. Barber were charged, as codefendants, with violating Arizona Revised Statute 32-1151, Contracting Without a License, a class one misdemeanor, in the Show Low Justice Court.
13. On October 18, 2005, Respondent began his joint representation by filing a notice of appearance in Ms. Hall-Lockwood's and Mr. Barber's criminal Contracting Without a License case.
14. On November 9, 2005, Respondent began his joint representation of Ms. Hall-Lockwood and Mr. Barber in their civil matter by filing a Notice of Appearance in CV 2005-406.
15. On March 29, 2006, Mr. Barber pled guilty to Contracting Without a License, a class one misdemeanor.
16. On March 29, 2006, Mr. Barber was sentenced to pay a \$1,009 fine in the criminal Contracting Without a License case.
17. On March 29, 2006, Ms. Hall-Lockwood's criminal Contracting Without a License case was dismissed.
18. On May 8, 2006, the civil matter, CV 2005-406, was dismissed pursuant to a stipulated agreement between Mr. Doyle, Ms. Hall-Lockwood, and Mr. Barber.
19. On May 31, 2006, Mr. Barber suffered a stroke.
20. In or around July 2006, Respondent and his wife purchased a mobile home in Apache Junction, Arizona for use as a residence by Mr. Barber and Ms. Hall-Lockwood.

21. On August 28, 2006, Mr. Barber assigned his interest in the partnership he had entered into with Respondent to Respondent, thereby ending their business relationship.
22. On December 15, 2006, Mr. Barber died.
23. Beginning in June 2007, Respondent and Ms. Hall-Lockwood began discussions about selling the mobile home purchased by Respondent, and which she and Mr. Barber had lived, to Ms. Hall-Lockwood.
24. On July 11, 2007, Respondent mailed a letter to Ms. Hall-Lockwood that outlined the terms and conditions on which he would sell the mobile home to Ms. Hall-Lockwood.
25. One of the terms and conditions Respondent required was that Ms. Hall-Lockwood sign an agreement that she had not and would not file a Bar Complaint against Respondent.
26. On August 9, 2007, Ms. Hall-Lockwood submitted her Bar charge against Respondent with the State Bar of Arizona. A Bar investigation subsequently began.
27. On September 29, 2007, Respondent submitted his response to the Bar investigation. In his September 29, 2007, response, Respondent stated numerous times that he had not represented Ms. Hall-Lockwood and, therefore, had no ethical responsibilities to her as a current or former client.
28. Respondent affirmatively asserts that he failed to review his records in responding to the State Bar's inquiry. For the purpose of the Tender of Admissions, the State

Bar did not contest this assertion, and no evidence was presented to the Hearing Officer to contradict this assertion.

29. In Respondent's subsequent submission during the investigation, Respondent only stated he represented Ms. Hall-Lockwood concerning the easement issue. Respondent failed to explain he also represented Ms. Hall-Lockwood in the criminal and civil cases.
30. Only through further investigation was the Bar able to learn the nature and extent of Respondent's numerous legal representations of Ms. Hall-Lockwood.
31. In the Joint Memorandum, the parties stipulate that there is no issue of restitution in this case. Bar Counsel further verified that fact during the Hearing on the Agreement. Therefore, there is no issue of restitution in this matter.
32. The Hearing Officer finds the above stated facts by clear and convincing evidence.

### **CONCLUSIONS OF LAW**

33. The Hearing Officer finds that the above enumerated conduct by Respondent violates Rule 42, Ariz.R.Sup.Ct., specifically:
  - ER 1.7, Conflict of Interest
  - ER 1.8(a), entering into a business transaction with client
  - ER 1.8(h), making prospective agreement limiting lawyer's liability
  - ER 8.1(b), failure to disclose a fact to the disciplinary authority
  - ER 8.4(a), violating the Rules of Professional Conduct
  - ER 8.4(d), engaging in conduct that is prejudicial to the administration of justice

34. The State Bar, pursuant to the agreement between the parties, dismissed the allegations that Respondent violated ER's 8.1(a), knowingly making a false statement of material fact, and 8.4(c), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, because the State Bar felt that it would be unable to prove that Respondent acted with the requisite knowing mental state by clear and convincing evidence.

#### **ABA STANDARDS**

35. ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; (4) the existence of aggravating and mitigating factors.

#### **The Duty Violated**

36. The Hearing Officer finds that Respondent engaged in professional misconduct that violated his duty to his client to avoid conflicts of interest with his client when he entered into a business transaction with them; then subsequently representing codefendants in a criminal case without obtaining a written conflicts waiver; then attempting to limit his former client's right to report Respondent to the State Bar. Respondent then violated his duty to the legal profession by failing to disclose facts necessary to correct a misapprehension that arose during the investigation.
37. The ABA *Standards* provide guidance in these matters and *Standard* 4.3, Failure to Avoid Conflicts of Interests, and *Standard* 7.0, Violations of Other Duties Owed as a Professional, appear to be most applicable.

38. *Standard 4.3* states:

“Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.”

39. *Standard 7.3* provides:

“Reprimand [censure in Arizona] is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.”

40. When there are multiple instances of misconduct, the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct. Respondent's most serious misconduct relates to his conflict of interest with his client. The presumptive sanction therefore is suspension.

#### **The Lawyer's Mental State**

41. Respondent admitted, and the Hearing Officer finds, that Respondent acted with a “knowing” mental state concerning the conflict of interest with his clients. Respondent admitted, and the Hearing Officer finds, that Respondent acted with a “negligent” mental state concerning the failure to correct the misapprehension allegation.

#### **The Actual or Potential Injury**

42. The parties submitted that there was no actual injury to Respondent's clients, but there was the potential for injury.

### **Aggravating Mitigating Factors**

43. The Hearing Officer finds the following aggravating and mitigating factors by clear and convincing evidence.

### **Aggravating Factors**

44. *Standard 9.22(a)*, Prior Disciplinary Offenses: On June 21, 2002, in State Bar file number 01-1628, Respondent was informally reprimanded and placed on probation for violation of Rules 41(g) and 51(a), Ariz.R.Sup.Ct.
45. *Standard 9.22(d)*, Multiple Offenses: Respondent violated numerous ethical duties and rules in this matter.
46. *Standard 9.22(i)*, Substantial Experience in the Practice of Law: Respondent was admitted to practice law on May 20, 1995.

### **Mitigating Factors**

47. The parties submit that there are no mitigating factors, and no evidence was offered of any mitigating factors. The Hearing Officer finds no mitigating factors.

## **PROPORTIONALITY REVIEW**

48. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality is “an imperfect process” because no two cases are ever alike, *In re Struthers*, 179 Ariz. 216, 887 P.2d 789 (1994), *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar, *In re Peasley* 208 Ariz. 90, 90 P.2d 772 (2004). It is also the goal of attorney discipline



that the discipline imposed is tailored to the individual case and that neither perfection nor absolute uniformity can be achieved.

49. In *In re Brown*, SB-07-0011-D (2007), Brown was suspended for five months, placed on probation for two years, and ordered to pay restitution. Brown entered into a business transaction with a client and traded furniture for legal services. Brown failed to memorialize in writing: the terms of the transaction to the client, advise the client to obtain independent legal advice, and obtained the client's consent to the transaction. In addition, Brown removed funds held in trust over the objection of his client's directive and prior authorization. Brown further failed to maintain adequate trust account records. There were three aggravating factors: 9.22(b), dishonest or selfish motive; 9.22(g), refusal to acknowledge wrongful nature of conduct; and 9.22(i), substantial experience in the practice of law. There was one mitigating factor, 9.32(a), absence of a prior disciplinary record. Brown was found in violation of ERs 1.8(a), 1.15(a), 1.15(e) and Rule 43(a) and Rule 43(d).
50. In *In re Dean*, SB-05-0135-D, 212Ariz. to 21, 129 P.3d 943 (2006), Dean was suspended for six months and placed on two years of probation upon reinstatement. Dean created a conflict of interest by continuing to appear before a judge after she entered into a romantic relationship with the judge. Dean also made false and material misrepresentations to the State Bar. There were four aggravating factors found: 9.22(c), pattern of misconduct; 9.22(d), multiple offenses; 9.22(e), bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; and

9.22(i), substantial experience in the practice of law. There were four mitigating factors: 9.32(a), absence of a prior disciplinary record; 9.32(b), absence of dishonest or selfish motive; 9.32(c), personal or emotional problems; 9.32(l), mental disability or chemical dependency. Dean was sanctioned for violation of Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.7(b), 1.16(a)(1), 8.1(a), 8.1(b) and 8.4(f).

51. In *In re Alcorn*, SB-04-001-D (2004), Alcorn was suspended for three months and placed on one year probation upon reinstatement. Alcorn failed to disclose a conflict of interest when he asked and obtained a loan from his clients for \$3,000. The terms of the loan were not transmitted to the clients in writing, and the clients did not consent to the loan terms in writing. There were two aggravating factors: 9.22(a), prior disciplinary history and 9.22(i), substantial experience in the practice of law. There were two mitigating factors, 9.32(e), full and free disclosure and cooperative attitude toward the proceedings, and 9.32(m), remorse. Alcorn was sanctioned for violation of Rule 42, specifically ER 1.8(a).
52. The parties submit, and the Hearing Officer does not disagree, that these cases support a six-month suspension.

### **RECOMMENDATION**

53. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, the administration of justice, and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). It is also the purpose of attorney discipline to instill

public confidence in the Bar's integrity. *Matter of Horwitz*, 180 Ariz., 20, 881 P.2d 352 (1994).

54. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Associations *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases, *Matter of Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994).

55. The parties submit, and the Hearing Officer concurs, that the following sanction is appropriate in this matter, and consistent with sanctions imposed in similar cases.

1) Respondent shall be suspended for six months.

2) Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings, and all costs incurred by the Disciplinary Commission, the Supreme Court of Arizona, and the Disciplinary Clerk's Office in this matter.

3) Respondent testified that it is his intention to no longer practice law in the state of Arizona, and so probationary terms were not discussed or submitted as part of the recommended sanction. If Respondent changes his mind and returns to the practice of law in the state of Arizona, it is this Hearing Officer's recommendation that Respondent be placed on a period of probation of two years, the terms of which would be determined at that time.

DATED this 13<sup>th</sup> day of January, 2009.

Hon. H. Jeffrey Coker /NM  
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk  
this 13<sup>th</sup> day of January, 2009.

Copy of the foregoing mailed  
this 14<sup>th</sup> day of January, 2009, to:

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